

**LETTER OPINION
2002-L-41**

July 12, 2002

Mr. John Warcup
Assistant City Attorney
City of Grand Forks
PO Box 12909
Grand Forks, ND 58208-2909

Dear Mr. Warcup:

Thank you for your letter asking whether a copy of an appraisal of real property requested by the landowner is an open record under N.D.C.C. § 44-04-18.

The City of Grand Forks (City) is acquiring property to construct the Grand Forks Flood Protection Project. This is a joint project between the Corps of Engineers (Corps), the city of East Grand Forks, Minnesota, and the City, with the costs being shared by the parties. The City is responsible to pay for and perform all necessary real estate acquisitions in Grand Forks under the agreement between the parties.

The requested appraisal was ordered by the City, the fee was paid by the City, and any negotiations for acquiring the real property are to be handled by the City. If negotiations are unsuccessful, an eminent domain or condemnation proceeding would be commenced in state court by the City which bears responsibility to acquire the property either through negotiation or condemnation proceedings.

Three appraisals were recently completed for the City that were not approved by the Corps. Additional information was requested from the appraiser, but the information submitted has not persuaded the Corps to approve the appraisal. A request to the Corps for a copy of one of the appraisals was made by the property owner under the Freedom of Information Act but was denied under 5 U.S.C. § 552(b)(5) on the ground that the unapproved appraisal is predecisional and part of a deliberative process. The property owner requested a copy of the disapproved appraisal from the City on May 16, 2002, and most recently on May 31, 2002. The Corps has asked the City not to provide a copy of the appraisal to the property owner.

The Corps denied the property owner a copy of the same appraisal in its hands under 5 U.S.C. § 552(b)(5)¹ that essentially makes a federal agency predecisional document, the purpose of which is to aid in the decisionmaking process, exempt from mandatory disclosure. Landfair v. U.S. Dept. of Army, 645 F. Supp. 325 (D.C.D.C. 1986). See also 32 C.F.R. § 578.37(e). The federal Freedom of Information Act deliberative process exemption does not, however govern city records.² Grand Cent. Partnership, Inc. v. Cuomo, 166 F.3d 473, 484 (2d Cir. 1999). Specifically, the exemption at 5 U.S.C. § 552(b)(5) only applies to inter- and intra-agency documents, and does not apply when the documents are possessed by an entity that is not a federal agency such as the City. Id.

In North Dakota, one starts from the premise that all records of a public entity are public records, open and accessible for inspection during reasonable office hours, except as otherwise specifically provided by law. N.D.C.C. § 44-04-18(1). Upon request for a copy of a specific public record, a public entity shall furnish the requester a copy. N.D.C.C. § 44-04-18(2). The City is a public entity. N.D.C.C. § 44-04-17.1(12)(b). “‘Record’ means recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business.” N.D.C.C. § 44-04-17.1(15).

There is no exception to the North Dakota open records law comparable to the deliberative process exemption under federal law. Rather, an exception under the North Dakota open records law must specifically relate to each item of recorded information and not to an entire file or process. 1997 N.D. Op. Att’y Gen. F-06.

In my opinion, the requested appraisal is an open public record in the City’s hands.

Sincerely,

Wayne Stenehjem
Attorney General

tam/vkk

¹ This law provides that predecisional information is not subject to mandatory disclosure by a federal agency, but does not provide that this information is confidential or prohibit its disclosure.

² The Freedom of Information Act does not apply to state governments, even when the state government is acting under a program funded by the federal government. St. Michael Convalescent Hospital v. State of California, 643 F.2d 1369, 1373-1374 (9th Cir. 1981).